Nos. 84-744 and 84-963

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES C. LANE AND DENNIS R. LANE

JAMES C. LANE AND DENNIS R. LANE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Defendants argue first (Br. 8-15) that misjoinder is inherently prejudicial and therefore requires automatic reversal of convictions on misjoined counts without an individualized or case-specific examination of actual prejudice. They fail to grasp the significance of Fed. R. Crim. P. 14, which requires both district courts and courts of appeals to ascertain the degree of prejudice resulting from joint trials; if such prejudice were generically impossible to identify, the inquiry would be pointless. While it is undoubtedly true that prejudice is in general more likely when there has been misjoinder than when Rule 8 has been complied with, there is no reason to suppose that the potential harm resulting

from misjoinder in any particular case is qualitatively different from that relevant under Rule 14, thus precluding inquiry into prejudice in one case but not the other. In fact, those courts that have applied the harmless error rule to misjoinder have been well able to identify the factors bearing on whether a verdict was affected by the error, such as the admissibility of evidence at separate trials, the nature of the misjoined counts and the role they played at trial, the presence of limiting instructions, and the quantum of evidence demonstrating the defendant's guilt. See, *e.g., United States* v. *Bibby*, 752 F.2d 1116, 1122 (6th Cir. 1985), petitions for cert. pending, Nos. 84-1692 and 84-1851; *United States* v. *Seidel*, 620 F.2d 1006, 1009-1011 (4th Cir. 1980).

Defendants mistakenly rely on several decisions of this Court. *McElroy* v. *United States*, 164 U.S. 76 (1896), could not have excepted misjoinder from the harmless error rule for the simple reason that no such rule was then in force (see U.S. Br. 25). Nor did *Kotteakos* v. *United States*, 328 U.S. 750 (1946), establish that the "dangers of transference of guilt" (*id.* at 774) are in all cases so great that prejudice must be presumed whenever counts are misjoined. The Court was referring to the facts before it, where at least eight different conspiracies had been proven, and to more egregious circumstances, such as where "a dozen, a score, or more conspiracies and at the same time * * * scores of men [are] involved" (*ibid.*). It contrasted the situation in *Berger* v. *United States*, 295 U.S. 78 (1935), where a variance involving proof of two conspiracies was held to be harmless error, and concluded (328 U.S. at 774) that the line between harmlessness and prejudice lies somewhere between the two extremes. As we explained in our opening brief (at 19), the Court in *Kotteakos*, far from excepting misjoinder from the harmless error rule, assumed that the rule would indeed apply in such cases. Finally, in making the completely fallacious assertion that the harmless error inquiry would expend more judicial resources than would be saved by avoiding unnecessary retrials, defendants quote out of

context (Br. 14) Justice Stevens' opinion concurring in the judgment in *United States* v. *Hasting*, 461 U.S. 499, 516-517 (1983). The Justice did not say that the courts of appeals are too busy to undertake the harmless error inquiry — he stated that this Court is too busy to do so.

2. Defendants argue next (Br. 15-20) that the harmless error inquiry required by Fed. R. Crim. P. 52(a) and 28 U.S.C. 2111 is inapplicable to violations of constitutional or statutory rights. This argument must, if it is to help defendants in this case, mean that the harmless error principle has no application even to violations of the Rules of Criminal Procedure, a far-reaching proposition that would reduce the role of harmless error to insignificance. That such a result is untenable is readily apparent from *Chapman* v. *California*, 386 U.S. 18, 21-22 (1967), where the Court rejected the considerably more modest argument that "all federal constitutional errors * * * must always be deemed harmful" and approved the policy of 28 U.S.C. 2111, which, without "distinguish[ing] between federal constitutional errors and errors [involving] * * * federal statutes and rules," prohibits "setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." Indeed, since *Chapman* the Court has repeatedly held that the harmless error requirement applies to violations of procedural rights afforded by the Constitution or by statute. See, *e.g., United States* v. *Hasting, supra* (prosecutorial comment); *Goldberg* v. *United States*, 425 U.S. 94, 111 (1976) (Jencks Act violations); see also cases cited at U.S. Br. 21.

The question is not, as defendants would have it (Br. 15), whether Fed. R. Crim. P. 8 establishes a "substantial right[]" within the meaning of Fed. R. Crim. P. 52(a) and 28 U.S.C. 2111, but whether any such right has been "affect[ed]" by a violation *that contributed to the jury's*

verdict.[1] See, *e.g.*, *United States* v. *Hasting*, 461 U.S. at 510-511; *United States* v. *Halper*, 590 F.2d 422, 433 (2d Cir. 1978); cf. *United States* v. *Young*, No. 83-469 (Feb. 20, 1985), slip op. 15 n.14 (requirement that plain error not only have affected substantial rights but have "had an unfair prejudicial impact on the jury's deliberations" implicitly applied to harmless error rule as well).

Defendants' reliance (Br. 16-17) on *Bruno* v. *United States*, 308 U.S. 287 (1939), is unavailing. In that case the Court stated that the version of 28 U.S.C. 2111 then in effect was simply "intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict." 308 U.S. at 294. As *Chapman* and federal statutory cases such as *Goldberg* demonstrate, however, this description of harmless error doctrine has no continuing validity. Indeed, the version of the harmless error statute to which the remarks in *Bruno* were addressed[2] was repealed in 1948 (62 Stat. 862). When the present version of the harmless error statute was enacted in its place, the adjective "technical" was deleted as a modifier of the word "errors." "[T]hese changes indicate a Congressional intention to emphasize

[1]Contrary to defendants' argument (Br. 18-20), moreover, the joinder rules further no interest on the part of defendants other than the accuracy of the truth-seeking process. See, *e.g.*, *Bruton* v. *United States*, 391 U.S. 123, 131 n.6 (1968). Indeed, the very factors that defendants identify, such as limiting the trial to a determination of personal guilt and guarding against the jury's possible use of evidence against one defendant in considering the guilt or innocence of a co-defendant, are obviously aimed at promoting accurate verdicts.

[2]Act of Feb. 26, 1919, ch. 48, § 1, 40 Stat. 1181. That Act provided in pertinent part:

> On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.

the concept that any error not causing detriment should be disregarded." *Brulay* v. *United States*, 383 F.2d 345, 351 (9th Cir.), cert. denied, 389 U.S. 986 (1967); see also *United States* v. *Seidel*, 620 F.2d at 1013; see generally *United States* v. *Hasting*, 461 U.S. at 509-510 n.7.[3]

3. In arguing that the misjoinder here was prejudicial (Br. 20-27), defendants erroneously invoke the standard enunciated in *Chapman* v. *California, supra*, for determining the harmfulness of constitutional errors. As we explained in our opening brief (at 20-21 n.14, 26 n.19), that standard is inapplicable here, because the joinder rule is not of constitutional magnitude. Defendants are also incorrect in claiming that the overwhelming strength of the evidence against them and the presence of limiting instructions are irrelevant to the harmless error analysis. See, *e.g.*, *Hasting*, 461 U.S. at 512; *Harrington* v. *California*, 395 U.S. 250, 254 (1969); *United States* v. *Apodaca*, 666 F.2d 89, 97 (5th Cir.), cert. denied, 459 U.S. 823 (1982); cf. *Francis* v. *Franklin*, No. 83-1590 (Apr. 29, 1985), slip op. 16-17 n.9 (limiting instructions fail to protect defendants only in "extraordinary situations").

Defendants' contention that the same evidence would not be admissible on retrial rests on three mistaken premises. First, they assert (Br. 24) that their intent might not be relevant on retrial. But their pleas of not guilty plainly put intent in issue. See, *e.g.*, *United States* v. *Russo*, 717 F.2d 545, 552 (11th Cir. 1983); *United States* v. *Wagoner*, 713 F.2d 1371, 1375 (8th Cir. 1983); *United States* v. *Roberts*, 619 F.2d 379, 383 (5th Cir. 1980). Second, defendants suggest (Br. 25) that they will be entitled to separate trials on

[3]Defendants' reliance on *Kotteakos* is misplaced in this regard also. Like *Bruno*, on which the Court there relied (328 U.S. at 764-765), *Kotteakos* was decided before both the amendment to the harmless error statute and the Court's decision in *Chapman*.

remand. But the court of appeals made it clear (Pet. App. 13a) that the government would be permitted, if it chose, to try defendants together provided count 1 were severed. That choice, of course, lies initially in the government's discretion. See, *e.g.*, *United States* v. *Rabbitt*, 583 F.2d 1014, 1021 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979) (joinder is permissive, not required); *United States* v. *Gay*, 567 F.2d 916, 919 (9th Cir. 1978) (defendants jointly charged are prima facie to be jointly tried). Third, defendants assume (Br. 25) that they could be jointly tried only on counts 2 through 4. The court of appeals ruled (Pet. App. 13a), however, that only count 1 was misjoined. Defendants could on remand be jointly tried on all of the remaining counts, including the perjury charge against Dennis Lane.

4. Finally, defendants' argument (Br. 27-33) that the evidence was insufficient to support their convictions for mail fraud on counts 2 through 4 rests on both a factual and a legal error. First, defendants claim (Br. 28), without citation to the record, that the funds in question had been irrevocably credited to their bank account before the charged mailings took place. As we pointed out in our opening brief (at 30-31), however, the evidence showed the opposite to be true.

Defendants' sole legal argument apparently is that 18 U.S.C. 1341 requires not only proof of their intent to defraud and of the foreseeable use of the mails in furtherance of their fraudulent scheme, but also proof that they specifically intended the use of the mails. The law is plainly otherwise. In *Pereira* v. *United States*, 347 U.S. 1, 8-9 (1954), the Court held that the charged mailing need be neither "contemplate[d] * * * as an essential element" of the fraudulent scheme nor "actually intended" by the defendant so long as it could "reasonably be foreseen." The mens rea required by Section 1341 is simply the intent to defraud, not the intent to defraud by using the mails. See

United States v. *Reed*, 721 F.2d 1059, 1060 (6th Cir. 1984) ("specific intent to use [the] mails is not necessary"). Because the charged mailings here were foreseeable and furthered defendants' scheme, they are within the statute. Moreover, defendants harbored the requisite intent to defraud at the time that they caused the mailings by submitting false claims to the insurance adjuster. Nothing more is required.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed insofar as it holds that the misjoinder of count 1 was reversible error and affirmed insofar as it holds that the evidence was sufficient to support defendants' convictions on counts 2 through 4.

Respectfully submitted.

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AUGUST 1985